***Chu Investment Inc v Mukasey 05-56791***

REED, District Judge, concurring in part and dissenting in part:

I find no fault with the majority's analysis of the Director's decision regarding the I-140 visa. However, the decision of the Administrative Appeals Office ("AAO") with respect to the closely related I-129 visa application is also relevant to the outcome of this case. So too is the fact that Chu failed to exhaust its administrative remedies with respect to the I-140 visa.

Both the I-129 and the I-140 visa applications involve the details of Yu's proposed work for Chu as general manager of the Burger King restaurant in Canoga Park, California, and the legal relationship of Chu to Julong. Chu submitted essentially the same job description for Yu for each application, and basically the same documentation of the relationship between Chu and Julong. The exhibit lists attached to Chu's I-140 application and I-129 application, although not identical, are for the most part duplicative.[1] Moreover, at oral argument when asked if the two visas involved the same underlying facts, Chu did not contest that the underlying facts are the same. The legal standards for the two visas are in substantial part identical.

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[1]In Chu's appeal to the AAO with respect to the I-129 petition, Chu was permitted to submit additional documentation. The AAO thus had more information than the Director when he denied the I-129 petition, but the AAO still determined that Chu had both failed to show that Yu's job was primarily managerial and had failed to establish Chu was a subsidiary of Julong.

With respect to the I-129 visa, the AAO's decision that Chu had failed to meet its burden of proving that Yu's job would be primarily managerial is supported by the record. Chu's application described Yu's responsibilities at the Burger King restaurant as only partly involving managerial duties – that is, only some of Yu's job entailed supervising managerial employees. Some of Yu's job at the restaurant would involve non-managerial duties such as bookkeeping and responding to customer complaints. Notably, Chu's I-140 application also specified that fifty percent of Yu's job responsibilities would be learning the fast food business and attending swimming pool trade shows.

Chu concedes that Yu's job would involve both managerial and non-managerial duties, but argues that his job would be primarily managerial. The record indicates, however, that Yu's job would be primarily non-managerial. Yu's work for Chu was to be split equally between working in the Burger King restaurant and pursuing other activities. An undetermined amount of time even in his restaurant work would be non-managerial, such as bookkeeping. Accordingly, it appears that less than half of Yu's work would be managerial and the agency did not abuse its discretion in denying Chu an I-129 visa. Importantly, my reading of the majority opinion is not that the majority would find fault with the AAO's decision.

Chu appealed the denial of the application for the I-129 to the AAO, but he did not administratively appeal the denial of his I-140 application. Although exhaustion of remedies with respect to Chu's I-140 application was not required by statute, "[c]ourts may require prudential exhaustion if '(1) agency expertise makes agency consideration necessary to generate a proper record and reach a proper decision; (2) relaxation of the requirement would encourage the deliberate bypass of the administrative scheme; and (3) administrative review is likely to allow the agency to correct its own mistakes and to preclude the need for judicial review.'" Puga v. Chertoff, 488 F.3d 812, 815 (9th Cir. 2007) (quoting Noriega-Lopez v. Ashcroft, 335 F.3d 874, 881 (9th Cir. 2003)). All three factors support requiring prudential exhaustion in this case. The second and third factors do so quite strongly.

Further, although prudential exhaustion is not jurisdictional, Stauffer Chemical Co. v. Food & Drug Administration, 670 F.2d 106, 107 (9th Cir. 1982), affording the *relief* of a remand where there is a failure to exhaust is still generally inappropriate. See McGee v. United States, 402 U.S. 479, 489-90 (1971) (holding that exhaustion was required and that a defense was therefore *precluded* despite potential errors committed by the Selective Service with respect to that defense); Puga, 488 F.3d at 815 (affirming a dismissal of a habeas petition on the basis of

prudential exhaustion); J.L. v. Soc. Sec. Admin., 971 F.2d 260 (9th Cir. 1992) (affirming a dismissal based on prudential exhaustion, but doing so without prejudice), overruled on other grounds by Lane v. Pena, 518 U.S. 187 (1996); Huang v. Ashcroft, 390 F.3d 1118, 1124 (9th Cir. 2004) (affirming a dismissal of a habeas petition on the basis of prudential exhaustion). A remand will "allow the agency to correct its own mistakes" in *this* case, Puga, 488 F.3d at 815, but the record makes it clear that the mistakes would have been corrected anyway had Chu exhausted his administrative appeals. There is no reason to condone this bypass of the agency's appellate scheme.

In sum, notwithstanding the Director's errors, there is no reason to remand this appeal and I would simply dismiss it. Accordingly, I respectfully dissent.